BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT HOUGHTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,396
W-G FERTILIZER COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
FARMLAND MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on January 5, 2000. The Appeals Board heard oral argument May 12, 2000.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared on behalf of claimant. Jeffrey E. King of Salina, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 5 percent disability based on functional impairment for a back injury. The ALJ denied work disability based on his finding that claimant was able to do the same job after the injury but voluntarily quit. Claimant contends he was not able to continue in the same job and argues he is entitled to work disability. Claimant also contends that even if the award is based on functional impairment, his functional impairment is higher than 5 percent.

The sole issue on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award by the Administrative Law Judge should be affirmed.

Findings of Fact

1. Claimant worked for respondent as a fuel truck driver. He injured his back on August 18, 1997, when he fell while attempting to pry open the bottom of a hopper car.

2. Claimant treated first with Dr. Nishua Bendt and then Dr. Kevin D. Komes. Dr. Komes sent claimant for an MRI in January 1998. The MRI showed compression fracture at T7 and T8 and no disk herniation.

3. Dr. Komes testified the compression fractures were less than 10 percent compression so they were mild and there was no evidence of spinal cord damage. He ordered an FCE, but claimant met only four out of ten validity criteria. Testing indicated possible symptom exaggeration. Dr. Komes rated the impairment under DRE Category II as 5 percent of the body. In January 1998, Dr. Komes initially placed claimant on a 30-pound lifting restriction but ultimately concluded no permanent restrictions were necessary and, as of March 13, 1998, released claimant to regular work.

4. Claimant was also treated by Dr. Gary Yarbrough from November 10, 1998, through December 18, 1998. Dr. Yarbrough agreed the compression was mild. Dr. Yarbrough found no physiological basis for claimant's back complaints at that time. Dr. Yarbrough testified he would have expected the fracture to have completely healed by the time he saw claimant. Dr. Yarbrough did not rate the impairment and testified he felt there may have been some symptom magnification. Dr. Yarbrough did not recommend restrictions. Dr. Yarbrough testified typically a compression fracture that is less than 10 percent heals up and you would expect the person to return to their normal job.

5. Claimant's injury was evaluated at the request of claimant's counsel by Dr. Daniel D. Zimmerman. Dr. Zimmerman rated claimant's impairment as 17 percent of the body. He also recommended claimant limit occasional lifting to not more than 20 pounds and frequent lifting to not more than 10 pounds. He also recommended claimant avoid frequent flexion of the thoracolumbar spine and avoid frequent bending, stooping, squatting, kneeling, and crawling.

Dr. Zimmerman reviewed the task list prepared by Mr. Jerry D. Hardin and agreed claimant has lost the ability to perform 63 percent of the tasks he performed in the work he did during the 15 years before this accident.

6. After claimant was released to full duty without restrictions in March 1998, claimant continued to work for respondent until May 1998. In May 1998, claimant quit his employment for respondent.

7. The Board finds claimant could have continued, after May 1998, to work for respondent at a comparable wage at employment appropriate to his injury. The Board so finds in spite of claimant's testimony that he could not do the work and that he had been told by Kirk A. Brungardt, manager of respondent's operations, that he would need to lift 100 pounds to remain employed. The Board finds the contrary testimony of Mr. Brungardt to be more credible. Mr. Brungardt testified he did not tell claimant he would need to lift 100 pounds. According to Mr. Brungardt, he prepared a job description after claimant was released to full duty. The job description, which he believed claimant would have received, shows a lifting requirement of 70 pounds. Mr. Brungardt testified that most of the work involved less than the 70 pounds. He further testified this was the busy part of their season and he could, and would, have found a variety of duties involving much lighter weights. He gave several specific examples.

The Board concludes that if restrictions were appropriate they would have been less restrictive than recommended by Dr. Zimmerman and could, and would, have been accommodated. Two physicians concluded no restrictions were necessary and suggested claimant may be exaggerating his symptoms. Claimant purports to have relied instead on the advice of Dr. Bendt when he concluded he should not do heavy lifting. But Dr. Bendt did not testify and her records were not introduced.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1999 Supp. 44-501(a).

2. K.S.A. 1999 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

5. The Board concludes claimant's decision to quit his employment with respondent was the equivalent of rejecting accommodated employment at a comparable wage. Claimant could, and would, have been retained in work appropriate to his injury but chose to quit. The Board therefore concludes claimant should be treated as though he were earning a wage that is equivalent to his preinjury wage and be limited to functional impairment.

6. The Board also agrees with and affirms the decision to adopt the rating of 5 percent given by the treating physician. Given the findings by both Dr. Komes and Dr. Yarbrough, the Board concludes Dr. Zimmerman's rating represents an exaggeration of claimant's impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on January 5, 2000, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Jeffrey E. King, Salina, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director